SUPREME COURT, U.S.
OCT 30 1974
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-507

RIGOBERTO GONZALEZ, ET AL.,
Petitioners,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
LOCAL NO. 1581, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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INTERNATIONAL LONGSHOREMEN'S
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LOCAL No. 1581, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners herein respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit rendered on August 1, 1974 which affirmed a judgment of the United States Court for the Southern District of Texas dismissing the complaint for want of jurisdiction.

OPINIONS BELOW

The Memorandum and Order of the District Court

rendered on December 22, 1972 is appended hereto as Appendix "A."

The Memorandum Opinion and Order of the District Court rendered on December 28, 1973 is appended hereto as Appendix "B."

The opinion of the Court of Appeals rendered on August 1, 1974 is appended hereto as Appendix "C."

JURISDICTION

Jurisdiction is predicated on Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C.A. §185(a). The District Court, in its Memorandum and Order of December 22, 1972, held that "the Plaintiffs have sufficiently pled a cause of action for breach of the duty of fair representation within 29 U.S.C. §185(a) and have invoked the jurisdiction of this Court." (App. "A," p. 3a). However, in its Memorandum and Order of December 28, 1973 the District Court reversed itself and dismissed the complaint for want of jurisdiction. The Court of Appeals placed the case on its Summary Calendar and affirmed the District Court's dismissal in a per curiam decision.

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C.A. §185(a) provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such

labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the citizenship of the parties.

REASONS FOR GRANTING THE WRIT

1. *The Court Of Appeals Has Decided A Federal Question In A Way In Conflict With Applicable Decisions Of This Court.*

2. *The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.*

3. *The Court Of Appeals Has Decided An Important Question Of Federal Labor Law And Policy Which Has Not Been, But Should Be, Settled By This Court.*

STATEMENT OF THE CASE

The Petitioners are twenty members of the Respondent Union who, for many years, have obtained employment through Respondent's exclusive hiring hall. During this period the Respondent has had successive collective bargaining agreements with private employers, including (but not limited to) Manchester Terminal Corporation, Petty Terminal Corporation and Long Reach Plant of Gulf Atlantic Warehouse Company.

In January, 1971 the Port of Houston Authority Purchased Long Reach in mid-contract at which time it

agreed orally with Respondent to abide by the exclusive hiring hall procedure pursuant to the agreements with the private employers, and to pay the prevailing wages and fringe benefits provided for in these privately negotiated agreements. In October, 1971 Respondent adopted a seniority system based on total years worked through the Respondent's exclusive hiring hall, as reflected by social security records. The assignments of seniority thereunder were and are fair and equitable and, as found by the District Court, "was generally a formalization of the informal system put into effect when the Port took over Long Reach" (App. "B," p. 8a).

A majority of the employees became dissatisfied because they were not receiving as much work as the Petitioners who, although in the minority, possessed greater seniority. Consequently in June, 1972 the Respondent acquiesced in a majority vote to reassign seniority by departments. Aside from the fact that the June, 1972 seniority assignments cannot be authenticated, and are otherwise arbitrary, the below comparisons reflect the more glaring examples of the adverse effects on employment opportunities:

	October 1971	June, 1972
Frank V. Gonzalez	25 yrs.	7 yrs.
Manuel Villareal	35 yrs.	9 yrs.
Carlos Rivera	30 yrs.	3 yrs.
Ruben Perez	31 yrs.	3 yrs.
Sam Ramos	31 yrs.	10 yrs.
Guadalupe Ayala	35 yrs.	6 yrs.
Jose Perea	35 yrs.	10 yrs.
Ramon M. Castellon	25 yrs.	10 yrs.
Elogio L. Rivera	30 yrs.	2 yrs.
C. G. Murillo	25 yrs.	1 yr.

Petitioners filed charges with the National Labor Relations Board and also filed the instant lawsuit.

After the charges with the NLRB were dismissed for want of jurisdiction and all appeals exhausted, briefs were filed with the District Court on the limited issue of jurisdiction under §301. On December 22, 1972 the District Court issued its Memorandum and Order asserting jurisdiction stating:

> The "exclusivity" of this relationship, and the alleged use of the private agreements to guide the conduct of the Local and the Port Authority are sufficient bases on which to impose the duty of fair representation upon the union. Since a "contract" within the meaning of §301(a) includes "any agreement significant to the maintenance of labor peace," *Deaton Truck Line v. Local Union 612*, 314 F.2d 418, 422 (5th Cir. 1962), the Plaintiffs have sufficiently pled a cause of action for breach of the duty of fair representation within 29 U.S.C. §185(a) and have invoked the jurisdiction of this Court (App. "A," p. 3a).

Some six months later the case went to trial on its merits. The District Court took the case under advisement and requested briefs on all issues — including the issue of jurisdiction under §301. In due course the District Court issued its Memorandum Opinion and Order (App. "B") in which it reversed its original decision, decided the case on its merits (adverse to the Plaintiffs) and dismissed for want of jurisdiction.

The Court of Appeals for the Fifth Circuit placed the case on its Summary Calendar and, without passing on

the merits, affirmed the District Court's dismissal for want of jurisdiction. In its per curiam decision (App. "C") the Court of Appeals held: (1) there was no collective bargaining between Respondent and the Port of Houston Authority; and (2) even if there was any such agreement it would have been void as against the statutory policy of the State of Texas. The only decisions cited by the Court of Appeals are set forth below together with the context in which the cases were cited:

> We think it is clear that there must be a collective bargaining agreement and a breach of that agreement to confer jurisdiction on a federal district court under Section 301 of the Act [footnote omitted]. See *Rae v. United Parcel Service of Pa.*, E.D. Pa. 1973, 356 F.Supp. 465, 468; *Genesco, Inc. v. Joint Council 13, United Shoe Workers of America*, S.D. N.Y. 1964, 230 F.Supp. 923, 928-29, 2 Cir. 1965, 341 F.2d 482 (App. "C," p. 18a).

Nor did the Court comment on the Fifth Circuit's decision in *Deaton Truck Line v. Local Union 612* in which it was held that a "contract" within the meaning of §301(a) includes "any agreement significant to the maintenance of labor peace."[1] Of greater significance the Court did not comment on this Court's decision in *Vaca v. Sipes*[2] and other Supreme Court decisions relating to jurisdiction under §301.

We will comment on these decisions briefly in our argument.

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1 314 F.2d 418, 422 (5th Cir. 1962).

2 386 U.S. 171 (87 S.Ct. 903).

ARGUMENT

Point Number One

The Court of Appeals Has Decided A Federal Question In A Way In Conflict With Applicable Decisions Of This Court.

When we say that the decision of the Court of Appeals is in conflict with applicable decisions of this Honorable Court, we do not intend to imply that the Court ignored identical precedents on identical facts. We simply say that there is sufficient Supreme Court enunciation of its views so as to warrant an opposite conclusion.

Before discussing (and distinguishing) the two cases relied on by the Court, let us examine the Supreme Court's decision in *Vaca v. Sipes* which deals in the main with the duty of fair representation but, inferentially, with jurisdiction under §301:

> . . .the duty of fair representation has stood as a bulkwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the Government urge, that the courts are foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of his complaint, since the Board's General Counsel has unreviewable discretion to

> refuse to institute an unfair labor practice complaint.[3]

As pointed out to the Court of Appeals the above-quoted related to whether the NLRB had *pre-emptive* jurisdiction. This Court then amplified the issue of jurisdiction as follows:

> The existence of even a small group of cases in which the Board would be *unwilling* [emphasis supplied] or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N.L.R.A. §8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.[4]

And, although a literal reading of Section 301(a) might at first blush contemplate only lawsuits between employers and labor organizations, this Court made it clear that an individual employee had standing, under Section 301, to sue his employer, his bargaining representative or both:

> The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact the employer

3 *Vaca* at 386 U.S. 182 (87 S.Ct. 913).

4 *Vaca* at 386 U.S. 197 (87 S.Ct. 920).

> may be (and probably should be) joined as a defendant in the fair representation suit,. . .[5]
>
> * * *
>
> The employee's suit against the employer, however, remains a §301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his §301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. The court is free to determine whether the employee is barred by the actions of his union representative, and, if not, to proceed with the case. And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a §301 suit, and the jurisdiction of the courts is not pre-empted under the *Garmon* principle.[6]

The foregoing of course relates to a breach of the contract by the employer involved, rather than a breach by the union.

We can see no reason, however, why a breach of the contract by a union should not be remedied by a §301 lawsuit against the union alone. First the individual employee has derivative §rights based upon a union's implied contractual obligation to represent him fairly. Secondly were, as in the instant case, the union has acquired by agreement or by arrogation the exclusive right to hire — a

5 *Vaca* at 386 U.S. 197 (87 S.Ct. 920)

6 *Vaca* at 386 U.S. 186-187 (87 S.Ct. 915)

right peculiarly that of the employer — the union's misbehavior in connection therewith would constitute a two-fold breach. Surely had an employer made such reassignments the bargaining agent would have had a duty to sue, if necessary, under §301.

The Court of Appeals could have concluded that such assignments were not arbitrary, and there was no breach of the duty of fair representation. But we submit that the court erred by concluding that it and the trial court were without jurisdiction under §301 to decide the dispute.

Turning to the two cases cited by the Court of Appeals we note that the first, *Rae v. United Parcel Service of Pa.*,[7] was a case wherein the union itself had *terminated* the contract. The second, *Genesco, Inc. v. Joint Council 13, United Shoe Workers of America*,[8] involved an attempt to invoke a no-strike clause under a *terminated* contract and before a new contract had been agreed upon. Clearly the contract between the Defendant and Long Reach did not "terminate" when the Port Authority purchased Long Reach, for the contract was specifically adopted respecting wages, fringe benefits and particularly the Union's exclusive hiring hall procedure. Let us set forth an analogy urged to the Court of Appeals of the Fifth Circuit involving this same defendant.

In *N.L.R.B. v. International Longshore Ass'n, Local No. 1581*[9] the court below upheld a finding of discrimination against one Elias Guerra based on his lack of citizenship. The charge was filed against the union alone although the discrimination occurred in the employment

7 356 F.Supp. 465 (E.D. Pa. 1973).

8 230 F.Supp. 923 (S.D. N.Y. 1964); aff'd 341 F.2d 482 (2nd Cir. 1965).

9 489 F.2d 635 (5th Cir. 1974).

of another employer with whom the union had a contract, Manchester Terminal Corporation. Suppose that the Port of Houston Authority had purchased Manchester Terminal in mid-contract, as it did Long Reach in the instant case. Would Guerra's charge against the union have been dismissed because the Port Authority is exempt from the Act? Would Guerra's backpay have been tolled as of the date of purchase? Would the union then be free to discipline Guerra for having filed the charge, or would the Board assert jurisdiction to protect its processes?[10] As Guerra's complaint to the Board was also a breach of the union's duty to represent him properly, could he have successfully maintained a suit under §301(a) in the U.S. District Court? Or would the Court say, as the Court below in effect said here, that the rights Guerra had acquired under the privately negotiated contracts were extinguished, and that the Court had no jurisdiction to enforce them?

Had the Court of Appeals followed its own decision in *Deaton Truck Line, Inc. v. Local Union 612, Etc.*[11] we submit that it would have conferred jurisdiction under §301. In *Deaton* the issue was whether independent contractors — i.e., technically not "employees" — could proceed to arbitration under §301. The facts show that the union had entered into a separate commercial agreement with an employer on behalf of these "individuals." The Court found that such an agreement was significant to the maintenance of labor peace and asserted jurisdiction under §301 notwithstanding their status as "individuals." As pointed out to the Court below, NLRB's General

10 *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418 (88 S.Ct. 1717). See also *Local 138, International Union of Operating Engineers, AFL-CIO*, 148 NLRB 679.

11 314 F.2d 418 (CA 5 1962).

Counsel refused to assert jurisdiction because, in his view, the Plaintiffs herein were "individuals" rather than "employees." This strained distinction is not in harmony with the views expressed by this Honorable Court. In *Retail Clerks Inter. Ass'n v. Lion Dry Goods, Inc.*[12] this Court held that jurisdiction existed under §301 upon a mere contract, and that such contract did not have to be a "collective bargaining agreement." While the Port Authority is prohibited by state law from entering into "collective bargaining" agreements it is not prohibited from entering into any and all agreements or contracts. The District Court specifically found:

> At the very most we have an informal, unwritten agreement between the Local and the Port that the Port will hire those employees sent to it by the local and pay them the same wage and provide the same benefits as the other employers at the Port. (App. "B," p. 10a-11a).

We do not construe the fact that the agreement is "unwritten" prevents it from being a "contract" under this Court's decision in *Retail Clerks (supra).* thus the decision of the Court of Appeals "that there must be a collective bargaining agreement and a breach of that agreement to confer jurisdiction on a federal district court under Section 301" is clearly at odds with decisions of the U.S. Supreme Court.

Finally we do not believe the dismissal is aided by the District Court's finding that the agreement was not violated "because seniority is not an element of that agreement" (App. "B," p. 11a). Seniority is not an element of the agreements with the private employers. Both

12 369 U.S. 17 (82 S.Ct. 541).

the Port Authority and the private employers, by agreeing to the Defendant's exclusive hiring hall, have delegated to the Defendant the matter of seniority. While an argument could be made that the private employers at least are still responsible for the manner in which the Union operates the hiring hall, the Court of Appeals for the Fifth Circuit has rejected this view.[13] It would be a marked irony to hold that the Union's breach of its obligation to administer the hiring hall fairly cannot be remedied by a lawsuit against the Union under §301.

We therefore submit that the per curiam decision of the Court of Appeals is contrary to decisions and views enunciated by the Supreme Court.

Point Number Two

The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

Petitioners' second point is addressed to the Court's action in peremptorily placing the case on its Summary Calendar and summarily disposing of the case without fairly setting forth the facts and treating with the issues presented.

We recognize that Local Rule 18[14] of the Court of Appeals has the laudable objective of expediting cases by

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13 *N.L.R.B. v. Houston Maritime Ass'n of Texas*, 418 F.2d 140 (5th Cir., 1969).

14 Local Rule 18 provides in pertinent part:

(a) Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

reducing oral argument. However we do not infer that the Summary Calendar is merely a prelude to disposing of a case in a manner suggesting that an appeal is utterly frivolous. We would hope that the Court is simply satisfied that the briefs alone provide a basis for it to render a decision setting forth all pertinent facts, addressing itself to the cases cited and articulating its reasons for its conclusions. Here the Court held that there was no collective bargaining agreement between the Respondent and the Port of Houston Authority. A more factual statement would be that there was no *written* agreement.

The parties stipulated that there was an *oral* agreement that the Port Authority would abide by the Union's exclusive hiring procedure and pay the prevailing wages and fringe benefits as set forth in the agreements with the private employers. Similarly the Court stated that the Port Authority looked to the Union as "a source of labor," while the record is clear that it did so as its *exclusive* source of labor. The duty of a union in administering an exclusive hiring hall is manifestly higher than that where it merely serves as a source of labor. The Court's per curiam decision failed to note the dismissal of the charges before the National Labor Relations Board — generally a prerequisite for obtaining jurisdiction elsewhere. And the Court did not note that most of the seniority was acquired under privately negotiated contracts.

The Court's citation of cases of *terminated* contracts is another example of judicial lethargy. Not only was the instant contract with Long Reach not "terminated" nor repudiated by the Port Authority, the Port Authority

specifically agreed to honor it in all pertinent respects. And, as pointed out above, even if the contract was terminated the seniority thereunder continued as a viable part of the expired agreement. The more troublesome feature of the decision is that it failed to deal with cited precedent both in the Fifth Circuit and the Supreme Court. These decisions have been discussed above. But they were also cited to the Court of Appeals and, we believe, were deserving of comment. We agree that the frivolous appeals should be dealt with summarily, with or without oral argument.

But we do not believe that an appeal should be dealt with summarily merely because the briefs and record set forth the facts and precedent to warrant placing the case on the Summary Calendar so as to dispense with oral argument.

Point Number Three

The Court Of Appeals Has Decided An Important Question Of Federal Labor Law And Policy Which Has Not Been, But Should Be, Settled By This Court.

Petitioners also respectfully submit that there is a broader issue involving employees' rights in general and federal labor policy that should be followed where collective bargaining agreements are attained by exercising those rights.

The right of employees to organize and engage in activities designed to foster the process of collective bargaining has been the federal labor policy for years.

Bargaining collectively is merely the beginning, however, not an end in itself. The end to be achieved is the consummation of collective bargaining agreements so as to minimize industrial strife among employers, employees and labor organizations. An employee's right to so organize and obtain such an agreement would be hollow indeed if the fruits of the contract could be taken away by the very labor organization possessing the duty and the power to represent him. Respondent admittedly had the duty. That it also had the power is the fact that, even after the Port Authority took over Long Reach, Respondent utilized seniority accumulated under the private agreements to furnish the Port Authority with its exclusive source of warehousemen. This is not a case where the political subdivision has taken over a facility and simultaneously rendered the bargaining agent impotent to continue in its representative capacity. Where, as here, the bargaining agent continues in its representative capacity, Petitioners submit that it is obligated to do so in a manner that is free of arbitrary and discriminatory classification and considerations.

Thus, in a broad sense, where Section 301 rights have survived the collective bargaining agreement, we urge that as a matter of federal labor policy any breach of those rights should be remedied through a lawsuit under Section 301.

CONCLUSIONS

For these reasons, a writ of certiorari should issue to review the decision of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the foregoing Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on the Counsel for Respondent, International Longshoremen's Association, Local No. 1581, AFL-CIO, Mr. Gerald J. Goodwin, Brock and Williams, Suite 250, The Main Building, 1212 Main Street, Houston, Texas 77002, by Certified Mail on this the ____ day of October, 1974.

Kenneth L. Tilley

APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FRANK V. GONZALEZ, ET AL,
Plaintiffs,

versus

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION,
LOCAL NO. 1581, AFL-CIO,
Defendant,

Kenneth Tilley, Houston, Texas
Attorney for the Plaintiffs

Warner Brock, Houston, Texas
Attorney for the Defendant

December 22, 1972

MEMORANDUM AND ORDER:

This is a suit by several members of the Defendant Longshoremen's Union Local 1581 against their Local seeking relief from alleged discrimination in the assignment of seniority on which the Local bases its referrals-for-work to private warehouses and the Port of Houston Authority. The Plaintiffs claim that, because of a change made by the union majority in the computation of seniority, they have been deprived of work with the Port Authority to which their seniority would otherwise entitle them.

Jurisdiction is asserted under §301(a) of the National Labor Relations Act, 29 U.S.C. §185(a), for violation of the duty of "fair representation." See, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). However the only collective bargaining contracts in existence are those between Local 1581 and the private warehouses. No such agreement exists between Local 1581 and the Port Authority. Indeed, as all acknowledge, the Port Authority cannot enter into collective bargaining contracts with a labor organization. V.A.T.S. Art. 5154c §1. Consequently, Local 1581 has moved to dismiss this action for lack of jurisdiction since there is no contract between the Local and the Port Authority. See, *Adams v. Budd Co.*, 349 F.2d 368 (3 Cir. 1965) and *Beausoleil v. United Furniture Workers*, 244 F.Supp. 719 (D.N.H. 1965).

The "duty of fair representation" is predicated upon the union's position as the exclusive bargaining agent of its members. *Ford Motor Co. v. Huffman*, supra, and see, *Morris, The Developing Labor Law*, p. 726-731 (1971). There is no collective bargaining agreement here, but the Plaintiffs allege and the Defendant denies that the Local and the Port Authority have an understanding or oral agreement whereby the Port Authority complies with the collective agreements in force in the port area. The Defendant admits that the Port Authority generally complies with such agreements, but insists that this is a unilateral undertaking by the Port Authority. The Plaintiffs allege and the Defendant admits that the Local has maintained an exclusive hiring procedure with the Port of Houston Authority whereby the Local refers members to the Port Authority for acceptance or rejection as employees.

The "exclusivity" of this relationship, and the alleged use of the private agreements to guide the conduct of the Local and the Port Authority are a sufficient bases on which to impose the duty of fair representation upon the union. Since a "contract" within the meaning of §301(a) includes "any agreement significant to the maintenance of labor peace," *Deaton Truck Line v. Local Union 612*, 314 F.2d 418, 422 (5th Cir. 1962), the Plaintiffs have sufficiently plead a cause of action for breach of the duty of fair representation within 29 U.S.C. §185(a) and have invoked the jurisdiction of this Court.

The Defendant's Motion to Dismiss for Lack of Jurisdiction is denied.

Clerk will enter this Memorandum and Order and provide counsel with true copies.

Done at Houston, Texas this 22nd day of December, 1972.

/s/ WOODROW SEAL
United States District Judge

APPENDIX "B"

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RIGOBERTO GONZALEZ, FRANK V. GONZALEZ, JESE O. GARCIA, MANUEL VILLAREAL, VICTOR RODRIGUEZ, CARLOS RIVERA, RUBEN PEREZ, SAM RAMOS, GUADALUPE AYALA, MARTIN O. CANTU, JOSE PEREA, JUAN F. GARCIA, RAMON M. CASTELLON, ELOGIO L. RIVERA, JUSTINO LOPEZ, CARLOS T. JASS, C. B. MURILLO, FIDEL PEREZ, ARNULFO CASTILLA and ISMAEL RODRIGUEZ,
Plaintiffs,

versus CA No. 72-H-765

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL NO. 1581, AFL-CIO,
Defendant.

Kenneth L. Tilley, Houston, Texas
Attorney for the Plaintiffs

Brock & Williams (Gerald J. Goodwin)
Houston, Texas
Attorneys for the Defendant

MEMORANDUM OPINION:

This is a civil action brought pursuant to § 301(a) of the National Labor Relations Act, 29 U.S.C. § 185(a), for violation of the duty of fair representation. The Plaintiffs

are twenty individual members of Defendant Longshoremen's Union Local 1581. They seek relief from alleged discrimination in the assignment of seniority on which the Local bases its referrals-for-work to the Port of Houston Authority. The Plaintiffs claim that because of a change made by the union majority in the computation of seniority they have been deprived of work with the Port Authority to which their seniority would otherwise entitle them. As relief Plaintiffs ask the Court to order Defendant to reinstate and re-adopt the seniority assignments that were in effect prior to June 19, 1972, and to pay back wages for income lost as a result of loss of employment following the institution of the June 19, 1972 seniority plan.

The Court, after hearing all of the evidence and arguments of counsel at trial, and upon all the files, records, proceedings and briefs herein enters the following Memorandum Opinion which shall constitute the Findings of Fact and Conclusions of Law in this case.

The evidence indicates that for many years Local 1581 had contracts or collective bargaining agreements with Manchester Terminal Corporation, Petty Terminal Corporation and then finally with Long Reach Plant of Gulf Atlantic Warehouse Company, each providing for certain wages, hours and other conditions of employment for employees who were members or represented by the Local. The employees represented by the Local were permanently assigned to either of two departments at the companies, the Cotton Compress Department or the Dock/Warehouse Department. On occasion, though, as provided in the collective-bargaining agreement those who usually did cotton compress work would be assigned

temporarily to dock/warehouse work. The permanent assignments were determined by either personal choice or company decision. The difference between the two types of work extended beyond just the type of work done to include differences in wages and benefits. In general cotton compress work paid a lower wage than dock/warehouse work. Furthermore, the collective-bargaining agreements in force provided for company contributions to the union pension and health benefits plans only for those employees working in the Dock/Warehouse Department. The workers in the Cotton Compress Department were covered by a group health insurance plan selected and maintained by the employer company, but no pension plan was provided for them.

Under the collective-bargaining agreement with these private companies the Union Local served as a hiring hall whereby it referred members and non-members for employment to said employers for acceptance or rejection as permanent or temporary employees. No seniority system was provided for the collective bargaining agreement except for the provision in the event it was necessary to reduce the work force, preference in continued employment would be given by the employer to qualified employees continuously employed by the employer during the preceding twelve months.

Sometime in 1969, due to a declining amount of cotton being brought to the Port of Houston, Long Reach discontinued operations in the Cotton Compress Department, transferring many of the employees to the Dock/Warehouse Department. In January, 1971, the Port of Houston Authority purchased Long Reach and began operating it. All sides concede that the Port, as a political

subdivision of the State, is barred from entering into collective bargaining contracts with a labor organization, V.A.T.S., Art. 5154c §1, and that therefore no collective bargaining agreement exists between the Port of Houston and ILA Local 1581. However, the evidence indicates that the Port looks to the Union exclusively to supply employees and pays them the prevailing wage rate as negotiated in the collective bargaining agreements in force with private employers at the Port.

On taking over the operation of Long Reach the Port of Houston began hiring through Local 1581 on a day-to-day basis; in effect the Local became a daily hiring hall Local. Workers reported to the Union Hall each day to be referred for dock/warehouse work at Long Reach and the evidence indicates that these referrals were made on the basis of seniority as to number of years an employee had worked through the Local, although no formal seniority system existed.

The Executive Board of the Local began working on a formal seniority system and met with the attorney for the Gulf Coast South Atlantic ILA for guidance. Their decision to institute a seniority plan resulted not only from the change in ownership at Long Reach but also because the ILA had in 1965 instituted a requirement that the Locals adopt a seniority system, and further because Local 1581, which is composed entirely of Mexican-Americans, was attempting to protect itself in the face of a possible court ordered merger with its Sister Local 1525, an all black local.

The seniority system adopted in October, 1971 by a unanimous vote of the members of the Local present at the

meeting was generally a formalization of the informal system put into effect when the Port took over Long Reach. Seniority was based on the number of years an individual had worked through the Local 1581 hiring hall, and in the event of doubt, an individual was required to furnish Social Security records as documentation. No differentiation was made between the types of work done by an individual; all that was considered was the number of years one had worked through the Local. The net effect of this was that some individuals who had spent all their time in dock/warehouse work were bumped down the seniority list by people who had worked in the Compress Department until it closed and who had greater seniority than the dock/warehouse workers. This of course would potentially decrease the opportunities for a person with less seniority to work. This displacement of Dock/Warehouse Department employees disrupted their accruing pension fund which had been instituted in 1956 and to which employers of Dock/Warehouse Department employees had contributed regularly but to which no contributions had been made for compress employees since they were not covered by the plan. Significantly, in order to qualify to receive the pension an individual needs credit for twenty-five years of contributions. It takes a minimum of one hundred hours per year in the Dock/Warehouse Department to receive a year's credit for the pension fund, and one thousand hours in a year in the Dock/Warehouse Department to get a year's seniority credit.

After the October 1971 seniority agreement was implemented, there arose some dissatisfaction in the Local especially among those who had spent all their time in dock/warehouse work, when they realized that those who had worked in compress had more seniority than they

did. The executive board consulted with the union attorney who advised them that they could institute a new plan and subsequently they did present to the members of the Local a plan which had dual lines of seniority — one for compress work and one for dock/warehouse work. The plan was adopted by a two-thirds majority vote of the members present at a meeting of the Local in June 1972. Due notice of the meeting and subjects to be voted upon was given.

The June hiring hall and seniority plan only assigned seniority to those individuals working through the Local for the Port of Houston Long Reach plant. The evidence indicates that the department in which a man had worked since 1945 can be determined by either Port of Houston records, ILA Maritime Trust Fund records, Local 1581 records, or eye witnesses. Furthermore, adjustment in original seniority assignments can be made by the Seniority Committee in cases of demonstrable error.[1] Thus the net result of the new seniority system was that those who had worked predominantly in compress found themselves with less seniority than those who had worked mainly in dock/warehouse, and thus arguably had decreased opportunities to obtain warehouse work.[2] However, it should be pointed out that in the event the Compress Department were to be reopened at Long

1 Indeed, since the institution of this plan, several individuals' dock warehouse seniority has been adjusted upward by the committee when proof of dock warehouse assignments was made via letter or records of private employers.

T. Rodriguez - 14 years to 15
R. Castillon - 10 years to 13
J. Renteria - 3 years to 4
M. Villareal - 9 years to 14
M. Cantu - 1 year to 3

2 The evidence reflects that in actuality Plaintiffs, as well as other individuals working through the Local are working as much or more now as under the previous systems but this is due to the increased volume of work at the Port.

Reach, those jobs would be filled in order of compress seniority. It was the institution of the June seniority system that led to Plaintiffs' bringing this lawsuit.

The Defendants have contended throughout the pendency of this cause that this Court lacks jurisdiction under § 301(a), Labor-Management Relations Act, 29 U.S.C. § 185(a) to consider Plaintiffs' claims. By Memorandum and Order of December 22, 1972 the Court denied Defendant's Motion to Dismiss for Lack of Jurisdiction, holding that the Plaintiff had sufficiently pled jurisdiction to that point. However, the jurisdiction has remained a live issue and the Court has continued to have grave doubts about its jurisdiction. Now that all the facts are before the Court is clear that no jurisdiction exists in this Court under § 301(a) over this cause of action.

Elementary to the maintenance of a suit under § 301 of the Labor-Management Relations Act is that the suit be for a violation of a contract or collective bargaining agreement between an employer and a labor organization, or between labor organizations.[3] *Hernandez v. National Packing Co.*, 455 F.2d 1252 (1st Cir., 1972); *Adams v. Budd*, 349 F.2d 368 (3rd Cir., 1965). But here we have no such contract because by law the Port is barred from entering into such contracts. At the very most we have an informal, unwritten agreement between the Local and the Port that the Port will hire those employees

3 §301 Labor Management Relations Act, 29 U.S.C. §185 provides in pertinent part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

sent to it by the Local and pay them the same wage and provide the same benefits as the other employers at the Port. No violation of that agreement has occurred because seniority is not an element of that agreement. The seniority system in question in this case is one imposed by the union members on themselves by majority vote. It is not a system bargained for by the union with the employer. The employer is in no way involved in the day to day administering of the system because the employees are selected and supervised by gang foremen appointed by the union executive board. If men must be cut from the gang, it is the gang foreman, not the employer, who is obligated to do so according to seniority. In *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418 (5th Cir., 1963), the Court urged a broad interpretation of the word "contracts" in § 301 suits observing:

> It is now settled that "contracts," . . . includes more than "collective bargaining agreements," and is broad enough to include any agreement "between employers and labor organizations significant to the maintenance of labor peace between them." Cite omitted.

Ibid. at 422. But even in that case the dispute arose out of a term in an agreement between the employer and the labor organization representing employees.[4] Clearly such is not the case before us. The Plaintiffs have made no showing of any agreement between the employer and the union, especially with respect to the employees' seniority, which has been violated. Thus the case does not fall

4 Significantly on rehearing the Fifth Circuit concluded they had erred in holding the agreement in question as being significant to labor peace and held that such a determination went to the merits of the grievance and would be decided by the arbitration.

within the ambit of § 301 and this Court must dismiss for want of jurisdiction.

Even if this Court were to find that its jurisdiction existed, it would still be compelled to deny to the Plaintiffs the relief which they seek. In order for a Plaintiff to sustain an allegation that the union has breached its statutory duty of fair representation he must establish that the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 385 U.S. 895 (1967). Such evidence does not exist in this case. If anything, the evidence shows the great extent to which the local has attempted to please everyone — a difficult feat indeed when attempting to represent as a Local two groups of people who have traditionally performed two types of work at two different wage rates. The two different seniority systems were forumlated after much thought and consultation with their attorneys. And most importantly, each was discussed and ratified by a majority of the union local's members. The situation in this case is analagous to that in *Humphrey v. Moore*, 375 U.S. 335 (1964) where one company was absorbed by another and the Union agreed with the company upon a plan which dovetailed the seniority of the employees of the two companies. The effect of this was to displace a number of employees. The Union represented both the employees who had been benefitted from the plan and the ones who were displaced. In denying a claim of breach of the duty of fair representation made by those employees displaced the Court commented on the wide range of reasonableness which the Union must be allowed in representing its members:

". . . . we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represented nor in supporting the position of one group of employees against that of another. In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 31 LRRM 2548, the Court found no breach of duty by the union in agreeing to an amendment of an existing collective bargaining contracting, granting enhanced seniority to a particular group of employees and resulting in layoffs which otherwise would not have occurred. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Id., at 338. Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." 375 U.S. at 349-350."

It is clear to the Court that no matter which seniority plan is adopted some members would benefit at the expense of others. The Defendant has acted with honesty and good faith in structuring and implementing the June 1972 seniority system and has committed no breach of its duty of fair representation.

Therefore, it is ORDERED, ADJUDGED and DECREED that the relief sought by Plaintiffs is in all things DENIED and that Defendant's Motion to Dismiss is in all things GRANTED, and this case is DISMISSED for want of jurisdiction.

The Clerk will enter this Memorandum Opinion and provide counsel with true copies.

Done at Houston, Texas this 28th day of December, 1973.

/s/ WOODROW SEALS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RIGOBERTO GONZALEZ, FRANK V. GONZALEZ, JESE O. GARGIA, MANUEL VILLAREAL, VICTOR RODRIGUEZ, CARLOS RIVERA, RUBEN PEREZ, SAM RAMOS, GUADALUPE AYALA, MARTIN O. CANTU, JOSE PEREA, JUAN F. GARCIA, RAMON M. CASTELLON, ELOGIO L. RIVERA, JUSTINO LOPEZ, CARLOS T. JASS, C. B. MURILLO, FIDEL PEREZ, ARNULFO CASTILLA and ISMAEL RODRIGUEZ,
Plaintiffs

versus C.A. No. 72-H-765

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL NO. 1581, AFL-CIO,
Defendant

Kenneth L. Tilley, Houston, Texas
Attorney for the Plaintiffs

Brock & Williams (Gerald J. Goodwin)
Houston, Texas
Attorneys for the Defendant

JUDGMENT:

For the reasons set forth in the Memorandum Opinion of even date and incorporated herein, it is ORDERED, ADJUDGED and DECREED that the Plaintiffs take

nothing, that the Defendant's Motion to Dismiss be and hereby is GRANTED and this cause is DISMISSED.

It is further ORDERED that the Defendant recover of the Plaintiffs its cost of action as provided by Rule 54(d) of the Federal Rules of Civil Procedure.

This is a Final Judgment.

The Clerk will enter this Judgment and provide counsel for all parties with true copies.

Done at Houston, Texas, this 28th day of December, 1973.

/s/ WOODROW SEALS
United States District Judge

Filed: Dec. 28, 1973

APPENDIX "C"

Rigoberto GONZALEZ et al.,
Plaintiff-Appellant,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL NO. 1581, AFL-CIO,
Defendant-Appellee.

No. 74-1658
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Aug. 1, 1974.

Appeal from the United States District Court for the Southern District of Texas

Before COLEMAN, DYER and RONEY, Circuit Judges.

PER CURIAM:

Displeased because their seniority rights were allegedly adversely affected by a majority vote of the union membership, plaintiffs brought suit under section 301(a) of the National Labor Relations Act, 29 U.S.C.A. § 185(a), for violation of the Union's duty of fair representation. The district court dismissed the complaint for want of jurisdiction. We affirm.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I

The Union served as a daily hiring hall for the Port of Houston. While the latter looked to the Union as a source of labor, there was no collective bargaining agreement between the Union and the Port.[1]

As a result of a seniority plan adopted by a majority of the Union in 1972, those who had worked predominately in the Compress Department found themselves with less seniority than those who had worked mainly in the Dock Department and thus had decreased opportunities to obtain dock work. The plaintiffs' suit followed.

We think it is clear that there must be a collective bargaining agreement and a breach of that agreement to confer jurisdiction on a federal district court under Section 301 of the Act.[2] *See* Rae v. United Parcel Service of Pa., E.D.Pa. 1973, 356 F.Supp. 465, 468; Genesco, Inc. v. Joint Council 13, United Shoe Workers of America, S.D.N.Y. 1964, 230 F.Supp. 923, 928-29, aff'd, 2 Cir. 1965, 341 F.2d 482. Fatal to the jurisdiction of the court below was the showing that there was no bargaining agreement between the Port and the Union.[3]

Affirmed.

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1 Any such agreement would have been void as against the statutory policy of the State of Texas. Vernon's Ann.Civ.St. art. 5154c, § 1.

2 Section 301(a) of the Act provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

3 Whether there was an "under the table" bargaining agreement between the Port and the Union as suggested by the plaintiffs does not merit discussion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-507

RIGOBERTO GONZALEZ, ET AL.,
Petitioners,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
LOCAL NO. 1581, AFL-CIO,
Respondent.

RESPONDENT'S REPLY TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

RESPONDENT'S REPLY TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Respondent prays that petitioner's petition for writ of certiorari be denied.

ISSUE

Did the Court of Appeals for the Fifth Circuit correctly hold that there was no jurisdiction under Section 301(a) of the Labor Management Relations Act?

STATEMENT

I.L.A. Local 1581 is a small union of about 100 active members whose membership works for various employers at the Port of Houston. In January of 1971 the Port of Houston Authority took over operations of the Long Reach Plant which employed many of the members of I.L.A. Local 1581. Contrary to past practice the Port of Houston Authority commenced hiring on a day-to-day basis. For the first time in its history of about 36 years it became necessary for I.L.A. Local 1581 to adopt a formal hiring hall and seniority plan as means of referring employees to the Port of Houston Authority. Such a plan was adopted by a majority vote of the membership in October of 1971. After considerable dissatisfaction with the operation of the plan a subsequent plan was adopted in June of 1972. Those members who were disgruntled with the June, 1972 plan have brought this lawsuit.

The district court held after a trial on the merits that the complaint should be dismissed for want of jurisdiction and in the alternative that the defendant should prevail on merits. The Fifth Circuit Court of Appeals sustained the district court's dismissal for want of jurisdiction.

REASONS FOR DENYING THE WRIT

1. There was no collective bargaining contract before the district court to give it jurisdiction under Section 301(a) of the Labor Management Relations Act, 1947. 29 U.S.C.A. § 185(a). Any such agreement with the Port of Houston Authority would have been void as contrary to the statutory policy of the State of Texas. Vernon's Ann. Civ. St. Art. 5154c, § 1. This finding by the Fifth Circuit Court of Appeals is not in conflict with any decision by this Court.

Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.[1] relied upon by Petitioners is not dispositive since it involved an agreement between a labor organization and a *private* employer. The record in the instant case reflects that the hiring hall and seniority plan were developed internally without the participation of any employer, public or private. The "strike settlement agreement" in *Lion Dry Goods, Inc.* which the Court found conferred jurisdiction on the federal district court under Section 301 of the Labor Management Relations Act is factually remote from the instant case where a contractual relationship between Respondent I.L.A. Local 1581 and the State of Texas is prohibited by Statute. Similarly factually remote is *N.L.R.B. v. International Longshoremen's Ass'n, Local 1581*[2] which involved a Board finding of a specific statutory violation by I.L.A. Local 1581 in requiring citizenship as a basis for job preference with a private employer. To suggest that there is an analogy to the issue raised in this case is to invite the Court to engage in speculation.

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1. 369 U.S. 17.

2. 489 F.2d 635 (5th Cir. 1974), petition for writ of certiorari filed August 14, 1974, case no. 74-117.

2. The Court of Appeals did not depart from the accepted and usual course of judicial proceedings so far as to call for an exercise of this Court's power of supervision. Petitioner cites no authority for this proposition. The record below was fully developed and Respondent submits that it fairly supports the procedure followed by the Fifth Circuit.

3. There is no important question of federal law which should be settled by the Court in this case. At issue is a rather narrow factual issue involving local law. The facts were found adversely to the Petitioners and there was no showing that such findings were "clearly erroneous". There is simply absent the type of agreement that is the necessary predicate for jurisdiction under Section 301(a) of the Labor Management Relations Act.

CONCLUSION

For the foregoing reasons, Respondent prays that Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BROCK & WILLIAMS

By Warner F. Brock

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Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the foregoing Respondent's Reply To Petitioner's Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit were served on the Counsel for Petitioners, Rigoberto Gonzalez, et al., Mr. Kenneth L. Tilley, 802 Texas Professional Tower, Houston, Texas, 77002, by Certified Mail on this the 21 day of November, 1974.

Warner F. Brock

WARNER F. BROCK